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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. NATHANIEL DAVID PORTER, Defendant and Appellant.	F055715 (Super. Ct. No. 07CM3809) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kings County. Peter M. Schultz, Judge.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Gomes, Acting P.J., Dawson, J. and Hill, J.

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Defendant was convicted of two counts of attempted murder of a peace officer (Pen. Code, §§ 664, 187), one count of carjacking (Pen. Code, § 215), one count of driving in willful and wanton disregard for the safety of others while evading a peace officer (Veh. Code, § 2800.2), and one count of hit and run driving with injury (Veh. Code, § 20001, subd. (a)). He contends substantial evidence does not support his attempted murder convictions on any of the theories presented.

FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 2007, shortly before 2:41 a.m., Michael Sharp and Kathryn Gonzales stopped at a Valero gas station and convenience store in Visalia to buy sodas. Sharp went in the store, while Gonzales waited in the gray Dodge Ram pickup with the engine running and the heater on. While Sharp was in the store, two men wearing hooded sweatshirts and glasses approached the pickup from the rear, one on each side. They opened the doors at the same time; the one on the passenger side ordered Gonzales to get out of the car. He held something dark in his hand she believed was a gun; she could not describe it, but from the way he held it and the clicking sound she heard, she believed it was a gun. She got out of the pickup and the two men got in and drove off.

Sharp came out of the store in time to see the men getting into the pickup; he reached out to open the driver's door just as the truck drove away. He saw the pickup entering highway 198, then ran back inside and asked the store clerk to call 911. While the clerk did so, Sharp ran outside, then went back inside and talked to the 911 dispatcher.

A pair of California Highway Patrol (CHP) officers, who were parked on the shoulder of 198 in Hanford after completing a traffic stop, observed the pickup traveling westbound on 198 at a high speed. As the pickup passed the patrol car, it swerved into the eastbound traffic lane to pass the two vehicles ahead of it. The CHP officers

activated their emergency lights and pursued the pickup. Radar indicated it was traveling 106 miles per hour. At approximately 2:56 a.m., the pickup pulled over and stopped on the 10th Avenue off ramp, with the patrol car behind it, about 15 feet away. There were two occupants in the pickup. As the CHP driver exited his patrol car, the passenger door of the pickup opened, the passenger got out, turned to face the patrol car, reached toward his waistband, then fired three to five shots at the officers; he jumped back in the pickup and it sped away again. The officers took refuge behind their vehicle; one fired two shots at the pickup as it fled. Bullet holes were later found in the hood of the patrol car.

The CHP officers again pursued the pickup. The officers eventually found the pickup; it had hit a fire hydrant and crashed into parked vehicles. The occupants were not present. A Bursa .380 handgun was found in the street among the wreckage. The passenger, Eric Armendariz, was found hiding in a nearby church. The driver, defendant Nathaniel Porter, turned himself in on December 3, 2007.

Defendant was charged with attempted murder of the two CHP officers, carjacking, and other violations. The parties stipulated defendant was the driver of the pickup at the time Armendariz shot at the CHP officers. Defendant presented the testimony of a friend, who stated defendant told him he did not participate in the carjacking. Rather, defendant said Armendariz stole the pickup, then picked defendant up at the apartments where defendant and Armendariz lived, to go see some girls in Hanford; defendant was driving when the shooting occurred. Defendant's father testified defendant had never been in trouble with the law and the offenses with which he was charged were totally out of character.

The jury convicted defendant of carjacking and both counts of attempted murder; it concluded it was not true that defendant personally used a firearm during the carjacking. The court instructed on three theories on which defendant could be convicted of attempted murder even though he did not pull the trigger: (1) defendant aided and abetted Armendariz in the commission of the offenses; (2) Armendariz's act of shooting

at the officers was a natural and probable consequence of the earlier carjacking in which both men had participated; and (3) defendant conspired with Armendariz to commit the carjacking. Defendant contends that none of these theories could be proved without proof that defendant knew Armendariz had a gun prior to the shooting. He contends there was no substantial evidence he knew Armendariz had a gun, and therefore the conviction of two counts of attempted murder is without sufficient evidentiary support.

DISCUSSION

I. Standard of Review

"In reviewing a challenge to the sufficiency of evidence, the reviewing court must determine from the entire record whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

II. Aiding and Abetting

Under California law, a person who aids and abets the commission of a crime is a principal in the crime, and shares the guilt of the actual perpetrator. (Pen. Code, § 31; *People v. Prettyman* (1996) 14 Cal.4th 248, 259.) "[A]n aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense; (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*Ibid*.) An aider and abettor is guilty not only of the crime he or she intended to aid and abet (the target crime), but also of any reasonably foreseeable offense committed by the person he or she aids and abets; in other words, the aider and abettor may be held criminally liable for any other crime that is the natural and probable

consequence of the target crime. (*Id*. at p. 261.) When the "'natural and probable consequences'" doctrine is implicated, in addition to the three elements listed above, "the trier of fact must also find that (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Id*. at p. 262, fn. omitted.)

"For a criminal act to be a 'reasonably foreseeable' or a 'natural and probable' consequence of another criminal design it is not necessary that the collateral act be specifically planned or agreed upon, nor even that it be substantially certain to result from the commission of the planned act. For example, murder is generally found to be a reasonably foreseeable result of a plan to commit robbery and/or burglary despite its contingent and less than certain potential. [Citations.]" (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530 (*Nguyen*).) "But 'to be reasonably foreseeable "[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. …" [Citation.]' [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*).) The question is "whether the collateral criminal act was the ordinary and probable effect of the common design or was a fresh and independent product of the mind of one of the participants, outside of, or foreign to, the common design." (*Nguyen*, *supra*, 21 Cal.App.4th at p. 531.) It is a factual question for the jury. (*Ibid*.) The test is objective: "whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Ibid*.)

III. Conspiracy

A conspirator may be vicariously liable for a crime committed by a coconspirator in furtherance of a conspiracy only if that crime was a natural and probable consequence of the conspiracy. (*People v. Prieto* (2003) 30 Cal.4th 226, 249-250.) As in the case of

aiding and abetting, this natural and probable consequence rule applies even if the crime ultimately committed was not part of the agreed upon plan and the conspirator did not intend that it be committed. (CALCRIM[1] No. 417; *People v. Hardy* (1992) 2 Cal.4th 86, 188.)

IV. Analysis

Defendant asserts, without citation of authority, that "culpability based on aiding and abetting Armendariz in the attempted murders requires proof that appellant knew Armendariz was armed with a gun." He then asserts there was no substantial evidence, i.e., "'evidence which is reasonable, credible, and of solid value'" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496), that defendant knew Armendariz had a gun prior to the shooting. With respect to conspiracy, he argues that because defendant did not know Armendariz had a gun in the pickup, the shooting was not a natural and probable consequence of the carjacking.

The test for aiding and abetting, when the aider and abettor is charged with a shooting offense alleged to be a natural and probable consequence of the target offense, does not require that the aider and abettor have prior knowledge that the shooter is armed. (*Medina, supra,* 46 Cal.4th at p. 927.) "The issue is 'whether, under all of the circumstances presented, a reasonable person in the defendant's position would have *or should have known* that the [shooting] was a reasonably foreseeable consequence of the act aided and abetted by the defendant.' [Citation.]" (*Ibid*.; accord *People v. Gonzales* (2001) 87 Cal.App.4th 1, 11.)

Although actual knowledge that the confederate was armed is not required, in this case there was sufficient evidence from which the jury could infer that defendant knew Armendariz was armed. This evidence was properly considered by the jury in

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1 Judicial Council of California Criminal Jury Instructions (2007-2008) (CALCRIM).

determining whether, under all the circumstances, Armendariz's act of shooting at the CHP officers was a reasonably foreseeable consequence of the carjacking.

Gonzales testified that the man who opened the door on the passenger side and told her to get out had a gun in his hands. She stated she knew it was a gun "[b]ecause I could hear it, and he just -- I just knew." On further questioning, she explained she had never seen a real gun, but she had heard the sounds guns make in television programs. The gun made a clicking noise. Also, Gonzales saw the way the man held his hands, which she demonstrated; he was not empty-handed. She could not say what color the gun was; she saw something dark, but his clothing was dark also.

On cross-examination, Gonzales again testified she thought the man who told her to get out of the pickup had a gun. When asked if she saw a gun, she responded, "I don't know." She reiterated that the man had something in his hands, held about waist high, and added, "It was dark, and I wasn't going to sit there and look and examine. I just wanted to get out of the car." Gonzales stated she heard a click, which she identified with a gun. She testified:

> "Q. And how -- why would you -- how could you identify if that was a gun if you've never even been around it?
>
> "A. I don't know. I just said --
>
> "Q. You're guessing?
>
> "A. Yes. …
>
> "Q. Okay. But nobody -- nobody put a gun in your face and said, 'Get out.' [¶] You just pretty much figured they had a gun because he had something in his hand; is that a fair statement?
>
> "A. (No response.) …
>
> "Q. Is that a fair statement?
>
> "A. Sure."

On redirect, Gonzales testified:

"Q. … Is it fair to say, however, that until Mr. Meyer [defense counsel] was questioning you, that you believed the person had a handgun?

"A. The whole time I've believed, and I mean, I can't tell you exactly what it will [*sic*] looked like, what size it was, but that's what I believe, so that's all I told the officers. That's what I thought.

"Q. Just to be sure, was your belief based upon the way the person held the dark object in the hand?

"A. And the sound that I told you.

"Q. The sound that you heard?

"A. Yeah."

Officer Brian Toppan testified that the sounds made by guns in television shows are similar to the sounds the guns actually make. He also testified to the operation of a Bursa .380 handgun, like the one found at the scene of the postshooting collision, which the parties stipulated was the gun used by Armendariz when he shot at the CHP officers. With a Bursa .380 handgun, when a round is chambered for the first time, it makes a metallic clicking or racking sound, but not just one click; if there is already a round in the chamber, however, the hammer can be pulled back manually to cock the gun, and it will make a clicking sound.

In addition to this testimony concerning the use of a gun during the carjacking, there was evidence that, in November 2007, someone in a gray hooded sweatshirt came up to Francine Mejia as she was entering a nail salon in Visalia and snatched her purse from her hand. After the carjacking and shooting, when police searched the apartment defendant and Armendariz shared, they found property belonging to Mejia. In a shoe box in a closet, they found her wallet, car keys, and some paperwork. In a suitcase in defendant's bedroom, they found Mejia's driver's license, Social Security card, and ATM card.

Officer Richard Pontecorvo testified that, during an interview with defendant after defendant turned himself in, defendant first denied knowing anything about a gun; later

defendant stated Armendariz had a gun, but he did not know where Armendariz kept it. When asked about Mejia's property found in his room, defendant stated Armendariz had robbed some lady with a gun a couple of weeks before.

Viewing the evidence in a light most favorable to the judgment, we conclude there was substantial evidence from which the jury could conclude Armendariz had a gun in his hand during the carjacking, and that defendant knew about the gun. Gonzales testified to her belief Armendariz had a gun when he told her to get out of the pickup, and the reasons for that belief. There was evidence defendant knew Armendariz had a gun and had used it to rob a woman two weeks before the carjacking. After the carjacking, defendant and Armendariz fled, with defendant driving the pickup; when the CHP patrol car pursued them with emergency lights flashing, defendant pulled over, waited while Armendariz got out, fired at the CHP officers, and got back in the pickup, then defendant drove away again at high speed. The jury could reasonably have inferred that defendant knew Armendariz would use the gun he had used in the previous robbery to commit the carjacking. From all the circumstances, the jury also could have reasonably concluded that a reasonable person in defendant's position would have or should have known that shooting at pursuing peace officers was a reasonably foreseeable consequence (i.e., a possible consequence which might reasonably have been contemplated) of the carjacking.

In *People v. George* (1968) 259 Cal.App.2d 424 (*George*), a witness, Kerwin, saw Forester and defendant stop on a street corner near a grocery store and talk; defendant walked toward the grocery store, then returned, tapping his right ear. The owner of the store wore a hearing aid and this may have signaled the owner was on duty. Defendant then ran across the street into a house. Forester went into the store and robbed the owner at gunpoint. Kerwin confronted Forester as he left the store; Forester knocked him down and shot at him, then ran into the house defendant had gone into. Defendant and Forester were subsequently found guilty of first degree robbery and assault with a deadly weapon.

The court found there was sufficient evidence to support defendant's conviction of robbery as an aider and abettor. It also found sufficient evidence of assault with a deadly weapon. "Defendant argues that there is no indication that he knew that Forester was armed. However, defendant's participation and knowledge of the robbery prior thereto would lead to a reasonable inference that he knew Forester was armed. Furthermore, the assault by Forester on Kerwin while attempting to escape was the natural and probable consequence of the robbery." (*George, supra*, 259 Cal.App.2d at p. 429.)

There was more evidence in this case than in *George* that defendant knew his companion was armed at the time of the target offense. There was substantial evidence supporting the jury's conclusion that the shooting by Armendariz was a natural and probable consequence of the carjacking, for which defendant could be convicted as an aider and abettor or as a coconspirator.

DISPOSITION

The judgment is affirmed.